No. 85-2033

Supreme Court, U.S.
FILED
JUN 10 1986
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

NINTH STREET COMMUNITY PAVING PROJECT COMMITTEE, *et al.*,
Appellants,

v.

THE CITY OF IRONTON, OHIO, *et al.*,
Appellees.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF OHIO

JURISDICTIONAL STATEMENT

MICHAEL GELTNER
Geltner & Associates
10 E Street, S.E.
Washington, D.C. 20003
(202) 547-1136
Counsel of Record

FREDERICK M. GITTES
KATHALEEN B. SCHULTE
Spater, Gittes & Terzian
723 Oak Street
Columbus, Ohio 43205
(614) 221-1160

ROBIN A. BOZIAN
Southeastern Ohio Legal Serv.
407 Second Street
Marietta, Ohio 45750
(614) 374-2629
Counsel for Appellants

June 10, 1986

CASILLAS PRESS INC. – 1717 K ST NW WASHINGTON DC 20006 – 223-1220

QUESTION PRESENTED

Whether the holding by the Supreme Court of Ohio that presumed "common knowledge" of ongoing street improvements satisfied the requirement for actual notice, including notice by certified mail, under Ohio's street assessment statutes rendered the notice statute unconstitutional as applied under the Due Process Clause of the Fourteenth Amendment when: (1) the affected property owners, a number of whom lived on unimproved side streets, had no knowledge of planned assessments or their statutory right of objection; (2) the assessing authority failed to mail any notice to some appellant-property owners, knowingly mailed notice late to others and took no action when mailed notice was returned undelivered; (3) the only other attempted formal notice was by newspaper publication which failed to list by name, address or lot number the affected property owners; and (4) the assessments were substantial (exeeding in some cases the total value of the assessed property) and constituted by operation of state law liens enforceable by foreclosure.

PARTIES TO THE PROCEEDINGS IN THE SUPREME COURT OF OHIO

APPELLANTS: American Legion Post; Coy Bacon; Lacy Baker; Rodney Banks; Clyde Banks; Don Battise; Carl H. Berger; Lester Bishop; Marvin and Nancy Black; Hattie Blanche; Columbus Boykin; Leroy and Maxine Boykin; William Boykin; James Brammer; Adelle Brooks; Henry Brown, Jr.; Michael and Belinda Brown; Sam Brown; Emerson R. Browning; Jesse and Hazel Cain; Charles I. and Gloria Carlisle; William R. and Jane Carter; Haskell and Ella Coleman; Laurence and Lucille Collins; Thelma and Casey Colvin; Condit Culbertson; Jemus Cunningham; Claude E. Davis; Velma Davis; Howard T. Dawkins; John B. Davidson; Rosalie Deere; Dean Dillon; Norma and Jonas Doughman; Richard L. Duvendeck; Herschel and Elizabeth Estepp; Alfred D. Ferguson; Delores Jean Ferguson; Marsian Ferguson; Ernestine Fields; Earl C. Fletcher; Joseph Fletcher; William and Elsie Fletcher; Coss Ford; Marjorie Ford; Gordon H. Fossett; Wilma Fox; Harold and Betty Gordon; Greater Emmanuel Church; Danny F. Greene; Freda M. Hafle; Arthur R. and Opal V. Hall; Samuel T. Hayes; Jack Holland; Eugene and Irene Holley; Glenn R. and Freda Holmes; Zelma S. Holmes; Ruby Howard; Lucille Hubert; John W. and G. Faye Huff; Haywood Isaac; James A. and Marjorie Jackson; William and Janet Jackson; Emmett R. Jenkins; Earl and Maggie Johnson; George D. and Verna Johnson; Betty Rapp Jones; Joe and Flo Kavanaugh; Lloyd and Rosemarie Kavanaugh; Lawrence Keating; Albert D. and Ruby M. King; Arthur W. King; Georgia and Charles Laber; Patricia J. Lambert; Gwen and Nathan Lewis; Herbert A. Lewis, Sr.; Kenneth Lisath; Isabel Livisay by Laverne Thomas; Leonidas and Frances Livisay; A.D. and Margaret Lutz; James W. McConnell; Margaret McCreary; Michael W. McFann; John

Mabry; Roberta Malone; Lowell and Stella Massie; June R. Meredith; Floyd and Lillian Miller; Evaline E. and Howard Miller; McKnuckle Mills; Lucille Monroe; A.L. Moore Lodge #442; Tabitha Nelson; Elsie O'Leary; Danny Pancake; Dorothy, Charles and Pamela Payne; Richard and Elaine Payne; Virginia S. Payne; William T. and Beverly D. Payne; Edward and Mary Pleasant; Harold T. and Cheryl L. Pleasant; Robert and Virginia Pleasant; Marjorie Pratt; Eugene Quarles; Quinn Chapel A.M.E. Church; Mr. and Mrs. Henry Roach, Jr.; Henry Roach, Sr.; H. Rosetta Roberts; Earl R. Robinson; Hyacinth Rollins; Frank A. Royal, Sr.; Gloria and Hobart Royal; Marjorie Searles; Ruby Shropshire; Clarence Smith; Robert and Doris Smith; Clyde Sneed; Charles Stapleton; Eugene and Elizabeth H. Steward; Naomi K. Steward; Steve Strunk; John Sullivan; James E. and Sally Syar; First Tabernacle Church; Frank Taylor, Jr.; Marshall Taylor; Rubin Taylor; Amos Thomas; Cvell Thomas; Martha Thomas Johnson; Triedstone Baptist Church; Hannah C. and Rachel Urick; Darwin Vanderpool; Carrie Ailster Vinson; Raymond Vinson; Frances Washington; James R. and Patty Watson; Joseph and Roberta Williams; Mary E. and Walter F. Williams; Mr. and Mrs. John Winfree; Harlan L. and Fern Wise.

APPELLEES: the City of Ironton, Ohio; Ray Duty, in his capacity as Recorder of Lawrence County, Ohio; William Sheridan in his capacity as Mayor of Ironton, Ohio; William Anderson, Eugene Moody, Dorothy Nenni, Raymond Payne, Jerry Watson, Robert Lipker and Robert Ford, in their capacities as members of the City Council of Ironton, Ohio; Jennifer Howard, in her capacity as Clerk of the City Council of Ironton, Ohio; James A. Payne, in his capacity as County Treasurer of Lawrence County, Ohio. 28 USC §2403(b) may be applicable to this proceeding.

TABLE OF CONTENTS

Page

QUESTION PRESENTED ..... (i)

PARTIES TO THE PROCEEDING IN THE SUPREME COURT OF OHIO ..... (ii)

TABLE OF AUTHORITIES ..... (vii)

OPINIONS BELOW 1

JURISDICTION 2

STATUTES INVOLVED 2

STATEMENT OF THE CASE 3

QUESTION IS SUBSTANTIAL 11

CONCLUSION 17

APPENDIX .

APPENDIX A
Opinion of Supreme Court of Ohio in decision to be reviewed 1a

APPENDIX B
Opinion of Court of Appeals for Lawrence County, Ohio 15a

APPENDIX C
Opinion of Court of Common Pleas for Lawrence County, Ohio 30a

APPENDIX D
Order of Supreme Court of Ohio denying rehearing 45a

Page

APPENDIX E
Judgment of Supreme Court of Ohio 46a

APPENDIX F
Notice of Appeal 48a

TABLE OF AUTHORITIES

Cases: Page

Armstrong v Manzo,
380 U.S. 545, 552 (1965) 15

Dow v. State of Michigan,
396 Mich. 192 (1976) 15

Fritz v. Board of Trustees of Town of Clermont,
252 N.E.2d 567 (Ind.Supr. 1969) 15

Green v. Lindsey,
456 U.S. 917 (1982) 12

Mennonite Bd. of Missions v. Adams,
462 U.S. 791 (1983) 12

Mullane v. Central Hanover Bank & Trust Co.,
339 U.S. 306 (1950) 12, 13, 14

Patterson v. City of Bismarck,
212 N.W.2d 374 (N.D.Supr. 1973) 16

Paul Scotton Can Co., Inc. v. Mayor & Council of Dover,
314 A.2d 182 (Del.Supr. 1973) 16

Walker v. City of Hutchinson,
352 U.S. 112 (1956) 12

Wenatchee Reclamation Dist. v. Mustell,
102 Wash.2d 8 (1984) 15

Statutes:

28 U.S.C. §1257(2) 2

§727.13, Ohio Revised Code 3

Constitution:

United States Constitution, Fourteenth Amendment ..... *passim*

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

No.

NINTH STREET COMMUNITY PAVING PROJECT COMMITTEE, *et al.*,

Appellants,

v.

THE CITY OF IRONTON, OHIO, *et al.*,

Appellees.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF OHIO

JURISDICTIONAL STATEMENT

OPINIONS BELOW

The opinions of the Lawrence County, Ohio Court of Common Pleas of January 20, 1983 (30a)* and the Lawrence County, Ohio Court of Appeals of July 9, 1984 (15a) have not been reported but are reproduced in the Appendix. The opinion of the Supreme Court of Ohio issued on January 29, 1986 is reported at 22 Ohio St.3d 25, 488 N.E.2d 204 (1a). Appellant's motion for rehearing before the Supreme Court of Ohio was denied on March 12, 1986, and the denial is not reported but is reproduced in the Appendix (45a).

---

*Citations refer to pages of the Appendix to Jurisdictional Statement of Appellants.

STATEMENT OF JURISDICTION

This is an appeal from the decision of the Supreme Court of Ohio (1a), affirming the Lawrence County, Ohio Court of Appeals decision (15a), which affirmed in part and reversed and remanded in part the decision of the Lawrence County, Ohio Court of Common Pleas (30a) which denied Appellants, Ninth Street Community Paving Project Committee, et al., a permanent injunction against the Appellees, City of Ironton, et al., enjoining the collection of street assessments levied by the Appellees on March 12, 1981 and June 4, 1981.

The Supreme Court of Ohio decision is officially reported at 22 Ohio St.3d 25 (1a). Appellant's motion for rehearing was denied on March 12, 1986 (45a). On June 2, 1986, the Appellants filed their notice of appeal in the Supreme Court of Ohio. The jurisdiction of this Court is invoked under 28 U.S.C. §1257(2).

STATUTES INVOLVED

28 U.S.C. §1257(2), as amended provides in pertinent part:

> Final judgements or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> . . .
>
> (2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United Staets, and the decision is in favor of its validity.
>
> . . .

Ohio Revised Code §727.13 states:

> Notice of the passage of a resolution of necesity and the filing of the estimated assessment under section 727.12 of the Revised Code, shall, after the estimated assessment has been made and filed as provided by section 727.12 of the Revised Code, be served by the clerk of the legislative authority, or a person designated by such clerk, upon the owners of the lots or parcels of land to be assessed for the proposed improvement, in the same manner as service of summons in civil cases, or by certified mail addressed to such owner at his last known address or to the address to which tax bills are sent, or by a combination of the foregoing methods. If it appears by the return of service or the return of the certified mail notice that one or more of the owners cannot be found, such owner shall be served by publication of the notice once in a newspaper of general circulation within the municipal corporation. The notice shall also set forth the place where such estimated assessments are on file and are open for public inspection. The return of the person serving the notice or a certified copy thereof or a returned receipt for notice forwarded by certified mail accepted by the addressee or anyone purporting to act for him shall be prima facie evidence of the service of notice under this section.

STATEMENT OF THE CASE

The appellants were among a large number of property owners who brought an action under 42 U.S.C. §1983 in March, 1982, in the Common Pleas Court of Lawrence County, Ohio, to enjoin the collection of street assess-

ments levied on their properties in March and June of 1981 by the City of Ironton, Ohio. The action was filed a few months after appellants learned that they did not qualify for a revised assessment relief program which had originally been adopted by ordinance in 1975 and was revised in July, 1981, in a manner which eliminated the potential eligibility of many of the affected property owners, including these appellants.

The assessments levied in 1981 were for street work completed in 1979. The assessments were substantial. They averaged over two thousand six hundred dollars ($2,600.00) per lot. In some instances, single lot assessments exceeded nine thousand dollars ($9,000.00). A number of the assessments exceeded the actual total value of the assessed properties (often vacant lots).[1] Once levied, the assessments operated as liens enforced by foreclosure.

The 1981 assessments were levied in connection with street improvements funded in substantial part with federal funds received by the city as a result of the low income levels of the property owners in the two areas targeted for street work (referred to hereafter as the 9th Street and 12th Street projects).

---

[1]As to the value of the assessed properties, appellants introduced the unrebutted testimony of the county auditor that the county periodically appraised the properties for tax purposes. He testified that the most recent appraisals were based on professional appraisals completed shortly after the street work was completed. He also testified that the appraisals were checked against computerized data as to actual sales prices in the area to assure the appraisals' accuracy. The only other testimony about property values was that of seven of the plaintiffs. All but one of them testified consistent with the auditor's appraisal. The sole plaintiff who felt his property was undervalued by three to five thousand dollars was not disputing his assessment as excessive under a state statute prohibiting assessments greater than one-third the actual value of the property assessed, as were other plaintiffs. Section 727.03, Ohio Revised Code.

Pursuant to Section 727.12 of the Ohio Revised Code, the city's council adopted a resolution of necessity for the 9th Street project on March 26, 1976. Section 727.13 of the Code provides that notice of the resolution and the place of filing of the estimated assessment shall be served upon owners of property to be assessed "in the same manner as service of summons in civil cases, or by certified mail. . . , or by a combination of the foregoing methods." Following completion of the required notice, a property owner has two weeks in which to file objections and any claims for damages which will be sustained as a result of the improvements. Sections 727.15 and 727.18 of the Ohio Revised Code. If an owner makes objection to the assessment, an Assessment Equalization Board is appointed by the city council pursuant to Section 727.16 of the Ohio Revised Code to hear and determine all objections. Only after the time for filing of objections and damage claims has expired can the city adopt an ordinance to proceed with the improvements. Section 727.23, Ohio Revised Code. The notice provided by Section 727.13 is the only notice required prior to the levying of assessments.

According to the city's Development Director, a week after the resolution was adopted, he supervised the mailing by certified mail of a copy of the resolution which made brief reference to a right to object to assessments within two weeks of receipt of notice without further explanation of the objection procedures under the statute. This April, 1976, mailing was only to a small portion of the affected property owners, none of whom is involved in this appeal.

For many of the appellants there is no documentary evidence verifying the mailing of notice, as the city could produce no records pertaining to many of the affected proper-

ty owners. For those owners for which records do exist, they reveal that many of the notices were either not delivered or were returned unclaimed. [4a] Some notices were prepared but never mailed. [Id.]

In all cases, according to the testimony of the Development Director, notices returned unserved, for whatever reasons, were filed away and no further action was taken to effetuate notice by mail or personal service.

At trial the city conceded that most of the affected 9th Street area property owners were not included in the April, 1976, mailing. Instead, on May 7, 1976, a copy of the resolution was published in local newspapers. [Id.] The published "notice" did not identify affected property owners by name, address or lot number. [23a] On the same date and in the absence of any ordinance to proceed with the street work, the construction of the streets began.

On September 9, 1976, the same day that the city council belatedly voted approval of an ord...ance to proceed with the 9th Street project which had been in progress for five months, the city made its first and only attempt to send certified mail notices to most affected property owners. [4a-5a] As in April, many of the notices were returned not delivered or unclaimed. Envelopes were prepared and not sent. For many property owners there exists no record whatsoever of any mailing.[2]

Those property owners who did receive notice received it long after the project had begun and well after the or-

[2]The city maintained files on the property owners for whom some kind of notice was attempted. For a substantial number of appellants, no files or records existed.

dinance to proceed had been passed and publicized. All of the appellants for whom no city records exist who testified stated that they received no notice and had no knowledge that they would be assessed for the street work until they received bills in 1981. A number of these appellants further testified that they lived on side streets which were not repaved or otherwise improved yet were, unbeknownst to them, subject to assessments under Ohio law for living near, but not on, a repaved street.

A month after passing the ordinance to proceed, the city council adopted an ordinance to proceed identical to the one passed on September 9, 1976, which was never repealed. The ordinance was passed again ". . . because most of the affected property owners had never received proper notice under the initial ordinance." [5a]

No further attempt at notice was made to supplement the previous mailings, however, even as to those returned undelivered or never mailed. According to the city records available, many of the few September notices which were delivered were received less than fourteen days before the ordinance to proceed was passed for the second time.

The events surrounding the 12th Street project were essentially the same as those surrounding the 9th Street project, except for the fact that the actions undertaken occurred on different dates. [Id.]

All of the lower courts in this case rejected appellants' due process claims even while conceding that the attempts at notice were "imperfect." In fact, one member of the Court of Appeals concurring in the judgment against appellants on this issue went so far as to describe the city's notice procedures as ". . . sloppy, bordering on incompetence." [29a]

In the trial court, the appellants, in argument and in post trial briefs, questioned whether the city's efforts to provide notice to appellants complied with either the state statute or the requirements of the Due Process Clause of the Fourteenth Amendment. The trial court's decision made only passing reference to appellants' notice claims, dismissing asserted due process violations summarily, relying exclusively on presumed knowledge:

> There was evidence offered by testimony of several individuals joined as plaintiffs, whose identify is not essential to this opinion, (*sic,* should be that) they did not receive notice as deposited in the mail by the City. The court finds subtantial compliance with the statutes in the testimony and stipulations. And, of course, a salient point when the prayer is for injunctive relief, no one residing in the Campbell-Kingsbury neighborhood can legitimately claim he was unaware of the construction of an improvement which interfered with the daily access to their homes for many, many months throughout the years of 1976, 1977, 1978 and 1979.

[40a]

In the Lawrence County Court of Appeals, in both argument and in briefs, the appellants contended that the lower court's decision interpreting the notice statute resulted in a violation of appellants' rights under the Due Process Clause and the plain meaning of the state law. Over the strong dissent of Judge Stephenson, the Court of Appeals rejected appellants' contention without much explanation. [16a] Judge Stephenson in dissent emphasized:

> With respect to assignment one, I would hold that notice was effective as to all appellants with

> the exception of those appellants for whom there is no record of service, where service was unclaimed and where notice was not mailed as illustrated by Plaintiffs' Exhibit #82. Brent McGinnis, the person in charge of notifying the landowners, testified that no follow-up was made with respect to notifying these persons. Although R.C. 727.13 provides that if owners cannot be found, service by publication in a newspaper of general circulation within the municipal corporation will suffice, the evidence in the record reflects that the published notice was dated, in many instances, prior to the dates in which service was attempted by certified mail. Moreover, the publication notice did not contain the names of the persons or descriptions of the property they owned to sufficiently apprise the parties who were not notified by certified mail. Many of the landowners for whom there was no record of service, to whom service was not mailed or for whom service was returned unclaimed, testified that they received no certified mail and either did not see the published notice or, if they read it, did not know it pertained to them. Accordingly, I would hold that the measures undertaken by the City to notify these persons was not reasonably calculated, under all the circumstances, to apprise them of the action about to be taken and, thus does not pass constitutional muster.

[23a-24a]

In the Ohio Supreme Court appellants challenged in argument and briefs the lower courts' interpretation of the state's notice provisions and questioned the constitutionality of the interpretation of the statute. The court rejected appellant's due process claims. Purporting to apply "equi-

table principles" and relying exclusively on presumed "common knowledge" in the project areas, Ohio's court of last resort commented:

> We find that appellees made a *bona fide,* albeit imperfect, attempt to notify property owners in the affected areas of Ironton by certified mail and by publication. In addition, we believe that the lower courts were correct in determining that the improvements made were within the common knowledge of the persons residing within the areas of the street projects. Our implementation of equitable principles to the matter at hand prevents the hypertechnical application of the notice provisions within R.C. Chapter 727, and compels us to affirm the finding of substantial compliance with respect to those provisions. Our holding of substantial compliance with respect to proper notice necessarily entails a rejection of appellants' due process argument. We therefore affirm the appellate court majority on this issue.

[9a]

In light of the state court's reference to "common knowledge" and an earlier reference to "some of the instant appellants" participating in meetings concerning federal funding and the street improvements, it should be noted that, of the 117 appellants to this appeal, only eight attended such meetings. As to the ongoing construction work (which of itself does not establish notice of proposed assessments or the procedures for objection), it was unrebutted that a number of appellants lived on area side streets which were not improved, and others owned property in the area but personally lived elsewhere — in some instances in other cities.

The fact that many affected property owners did not

know whether they were to be assessed was also confirmed by the city council member who originally sponsored the 9th Street project. He reported to council at the time of the improvements that there was confusion among property owners caused by publicity about the use of federal funds and the original assessment relief program. Under these circumstances "common knowledge" of ongoing street work hardly equates with actual notice that most area property owners, especially those on unimproved side streets, are to be assessed.

QUESTION IS SUBSTANTIAL

There can be no question that the actions of the city affected property rights of appellants. Indeed, some of the property owners will be literally deprived of the entire value of their lots.

Nor can it be seriously questioned that the failure of the city to provide timely notice to appellants of their rights was prejudicial. Appellants had numerous grounds to oppose passage of the ordinance to proceed (which by statute should not have been enacted until the time for filing of objections had passed) and to file objections to be reviewed by an equalization board.

Many of the appellants claimed foreseeable damages resulting from the street work. Many appellants were assessed for replacement of sidewalks which had only recently been installed at the owner's expense by order of the city. By ordinance the city also determined that sidewalks replaced due to grade changes resulting from the street repaving would not be assessed. Nonetheless, assessments included charges for sidewalks replaced due to grade changes. Many appellants would have also opposed the ordinance or sought relief through the equalization

board in connection with the assessment relief program originally enacted by the city.

An equalization board, acting in a quasi-administrative capacity, would have been free to grant relief to appellants which has not been available through the courts operating under different and more stringent legal standards.

This Court has repeatedly and explicitly held that if due process means anything it means the right to notice and an opportunity to be heard before governmental action which detrimentally affects the property rights of its citizens. *Mullane v. Central Hanover Bank & Trust Co.,* 339 U.S. 306 (1950); *Walker v. City of Hutchinson,* 352 U.S. 112 (1956); *Green v. Lindsey,* 456 U.S. 917 (1982); *Mennonite Bd. of Missions v. Adams,* 462 U.S. 791 (1983). Nor is this notice a mere technicality. As was emphasized in *Mullane, supra* at 314, ". . . when notice is a person's due, process which is a mere gesture is not due process." This court has reiterated time and time again, notice must be ". . . reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane,* at 314.

The city's attempts at notice were gestures, neither intended nor calculated to provide notice to appellants under the circumstances. This is demonstrated by the fact that the statutorily required certified mail notice was never sent in some instances. The city could not even produce any records whatsoever regarding mail notice for a large number of appellants.

The majority of notices which were sent were knowingly mailed by the city on the very day the city council passed the ordinance to which the notice invited objection and which state law prohibited being enacted until fourteen days after completion of the required certified mail notice.

In the few instances that timely notice was sent, the city ignored returns indicating the letters were not delivered and took no further action.,

For many appellants (whose notices were not mailed or for whom there is no record), the *only* attempted notice, despite the statutory requirements, was by newspaper publication which failed to identify by name, address, or lot number the individual property owners subject to the notice. This Court has explicitly rejected reliance on notice by such publication on more than one occasion. *Mullane, supra; Walker, supra; Mennonite Bd. of Missions, supra.* As this Court noted in *Mullane,* 339 U.S. at 315:

> Chance alone brings to the attention of even a local resident an advertisement in small type inserted in the back pages of a newspaper, and if he makes his home outside the area of the newspaper's normal circulation the odds that the information will never reach him are large indeed. The chance of actual notice is further reduced when as here the notice required does not even name those whose attention it is supposed to attract, and does not inform acquaintances who might call it to attention. In weighting its sufficiency on the basis of equivalence with actual notice we are unable to regard this as more than a feint.

The Ohio Supreme Court in its opinion below found that the city's notice procedures substantially complied with the state's statutory requirements and the Due Process Clause. The opinion ignored the decisions of this Court mentioned above, though they were presented as controlling authority by appellants.

The Ohio court justified its holding by reference to "common knowledge" of ongoing street work in the af-

fected neighborhood, even though the appellants who testified (some living on unimproved side streets) denied knowledge of the planned assessments or their statutory rights. If allowed to stand, the Ohio Supreme Court's ruling will make the notice requirements of the Due Process Clause meaningless. Municipalities such as Ironton can simply assert that their failure to provide notice is harmless because of "common knowledge."

In this Court's previous opinions, reliance on various forms of "constructive notice" such as by newspaper publication has been rejected after careful scrutiny. Bald reliance on presumed "common knowledge" offers even less assurance of actual notice.

In the instant case the presumed "common knowledge" was not even of the impending assessment proceedings. Affected property owners were presumed to have divined their statutory rights and responsibilities merely from observing street work in progress – even if the work was not on their own street. And what of the appellants who owned property in the project areas but lived elsewhere – in some instances out of state?

This matter should be given plenary consideration by the Court in order to maintain the vitality of the notice requirements of the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

CERTIORARI STANDARDS

Even if this Court lacked jurisdiction under its appeal criteria, it should exercise its discretion to review the case upon a Writ of Certiorari, because the holding below is in conflict with the precedents of this Court, beginning with *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 70 S.Ct. 652, 94 L.Ed. 865 (1950). Additionally, this

Court should grant review because the Ohio Supreme Court holding represents a conflict with the holding of other state courts, which have consistently followed the precedent set by *Mullane* and its progeny. In every instance these courts have rejected a presumption of notice in favor of actual notice.

The court below held that the Appellees substantially complied with notice requirements based on the City's *"bona fide,* albeit imperfect" attempt at certified mail notice, publication of the notice and presumed common knowledge. [9a] However, the Court did not find, nor could it find based on the evidence herein, that these Appellants had actual notice of the impending assessments "at a meaningful time and in a meaningful manner." *Armstrong v. Manzo,* 380 U.S. 545, 552, 85 S.Ct. 1187, 14 L.Ed.2d 62 (1965).

In *Fritz v. Board of Trustees of Town of Clermont,* 252 N.E.2d 567 (Ind. 1969), the Supreme Court of Indiana enjoined enforcement of special assessments where the affected property owner received no actual notice of the resolution of necessity. Rather, the assessing authority relied on publication and posting of the resolution.

Similarly, in *Dow v. State of Michigan,* 396 Mich. 192, 240 N.W.2d 450 (1976) a case involving a tax sale of property for delinquent taxes, the Supreme Court of Michigan held that land contract purchasers of property must be given actual notice and an opportunity to be heard before the taking. See also *Wenatchee Reclamation District v. Mustell,* 102 Wash.2d 8, 684 P.2d 1275 (1984) (requiring personal service or mailed notice in delinquent assessment foreclosure action).

Moreover, in those cases where "common knowledge" has been a consideration under the due process require-

ments of the Fourteenth Amendment, very different facts appeared from those in the instant controversy. For instance, in *Paul Scotton Can Co., Inc. v. Mayer & Council of Dover,* 314 A.2d 182 (Del. Supr. 1973), residents of an area sought annexation of their area into the City of Dover. The parties stipulated that there was general knowledge that annexation would involve assessments for city sewer and water services.

However, the court emphasized there was also evidence of actual notice. The Court found that the City mailed to the plaintiffs and other affected property owners a statement of the estimated cost of construction as well as a separate notice of the resolution stating the City's procedure for making the assessments and that they would become liens on the assesed properties. Thus, the Court held that the "totality of the circumstances" constituted notice and opportunity to be heard sufficient for due process requirements. The court specifically rejected constructive notice by way of newspaper publication as insufficient for due process requirements.

In *Patterson v. City of Bismarck,* 212 N.W.2d 374 (N.D. Supr. 1973), the Supreme Court of North Dakota held that personal notice or notice by mail is not a prerequisite to due process *per se.* "Actual notice of a hearing in addition to constructive notice is sufficient." *Id.* at 384. In that case, each of the appellants appeared in person or by attorney at the assessment commission hearing.

This Court should resolve the above conflicting state court opinions and the conflict between the Ohio Supreme Court's holding and this Court's previous rulings.

CONCLUSION

For the above reasons, the Court should note probable jurisdiction of this appeal, or in the alternative, grant a writ of certiorari.

Respectfully submitted,

MICHAEL GELTNER
Geltner & Associates
10 E Street, S.E.
Washington, D.C. 20003
(202) 547-1136
Counsel of Record

FREDERICK M. GITTES
KATHALEEN B. SCHULTE
Spater, Gittes & Terzian
723 Oak Street
Columbus, Ohio 43205
(614) 221-1160

ROBIN A. BOZIAN
Southeastern Ohio Legal Serv.
407 Second Street
Marietta, Ohio 45750
(614) 374-2629
Counsel for Appellants

June 10, 1986

APPENDIX A

22 Ohio St.3d 25

NINTH STREET COMMUNITY PAVING PROJECT COMMITTEE et al., Appellants and Cross-Appelles,

v.

CITY OF IRONTON et al., Appellees and Cross-Appellants.

No. 84-1560.

Supreme Court of Ohio.

Jan. 29, 1986.

Property owners brought an action seeking to enjoin the assessment and collection of street assessments levied on their properties. The Court of Common Pleas, Lawrence County, denied their claim for equitable relief, and the property owners appealed. The Court of Appeals reversed and remanded in part, and cross appeals were taken. The Supreme Court held that: (1) City substantially complied with the applicable notice provisions contained in apprising affected property owners of proposed projects and assessments, and (2) city did not properly use and account for the federal funds involved in certain projects giving rise to a special assessment.

Affirmed.

1. Municipal Corporations – 294(3), 486(3)

City substantially complied with the notice provisions contained in R.C. § 727.01 et seq. in apprising affected property owners of proposed projects and assessment.

2. Municipal Corporations – 488(4)

Active participation in causing an improvement to be made will estop the party engaged therein from denying the validity of the assessment; however, to create an estoppel merely from silence, it must be shown that the owner had knowledge that the improvement was being made, that it was intended to assess the cost thereof, or some part of it, upon his property, that the infirmity or defect in the proceedings existed which he is to be estopped from asserting, and that some special benefit accrued to his property from such improvement which it is inequitable, under the circumstances, that he should enjoy without compensation.

3. Municipal Corporations – 483(3)

Failure to file profiles and plans for certain projects with the clerk of the city council as required by R.C. 727.12 was not prejudicial to affected property owners where the record established that they did not request to see the plans or profiles of the projects, which were filed with the office of the city engineer.

4. Municipal Corporations – 459

Evidence established that the tax assessments were based on actual value of the subject properties and therefore the city, in making a special assessment, did not exceed the one-third limitation contained in R.C. § 727.03.

5. Municipal Corporations – 288(1)

City did not properly use and account for the federal funds involved in certain projects giving rise to a special assessment. R.C. § 727.05.

6. Municipal Corporations — 404(3)

Property owners were entitled to present evidence of alleged damages to their properties caused by street projects despite fact that they did not file claims for such damages within two weeks from the date of completion of the notice required under R.C. 727.13. R.C. § 727.18.

Defendant-appellees and cross-appellants are the city of Ironton and various city and county officials named individually in their capacities as governmental officials. Plaintiffs-appellants and cross-appellees comprise the Ninth Street Community Paving Project Committee, an unincorporated association, and resident-landowners of the city of Ironton who reside in the areas where the street improvements, the subjects of this action, took place.

As early as 1962, the city of Ironton considered street improvements in its environs in the areas known in this cause as the Ninth Street Development and the Twelfth Street-Liberty Avenue projects. The city delayed action in undertaking street improvements within these areas because the financing of such improvements would require special property assessments, and the property owners and residents within the areas did not enjoy the per capita income considered average for the city.

In 1975, the Ironton City Council decided to apply for federal funds through the United States Department of Housing and Urban Development's "Block Grant" program in order to assist the financing and development of street improvements in the Ninth and Twelfth Street areas of Ironton. At this time, an organization known as the "Ironton Community Development Committee" was formed in order to ensure public participation in the preparation of the Block Grant applications and in the

disbursement of any funds received pursuant thereto. The record indicates that a number of the appellant landowners in the areas in question were members of this committee and attended the meetings held by this committee in the early part of 1975. During the course of these meetings many of the essential points contained in the Block Grant applications were discussed. It was emphasized that the city was hoping to establish some sort of assessment relief program, inasmuch as most of the affected property owners were of limited economic means. It was also pointed out that the assessments on the projected street improvements would most likely be at a rate of $50 per lineal foot of the steet improved. The record indicates that the major facets of the street projects were widely publicized in the local media.

On March 25, 1976, the Ironton City Council adopted a resolution of necessity concerning the improvements for the Ninth Street area. However, the record indicates that final profiles and plans for the project had not been completed or filed with the clerk of city council in conformity with R.C. 727.12.

On April 1, 1976, the appellee city sent notices of the resolution of necessity by certified mail to a portion of the affected property owners. The record reveals that many of these notices were either not delivered or were returned unclaimed. Some notices were prepared but never mailed.

On May 7, 1976, a copy of the notice was published in local newspapers; however, the profiles and plans of the Ninth Street project were not completed until June 3, 1977.

On September 9, 1976, the city council passed an ordinance to proceed with the improvements identified in the

resolution of necessity. The record indicates that the first phase of the construction project had already begun on May 7, 1976. Also on September 9, 1976, most of the notices of the resolution of necessity were finally mailed to the affected property owners.

On October 7, 1976, the city council adopted an identical ordinance to the one passed on September 9, because most of the property owners had not received proper notice under the initial ordinance. Shortly thereafter, the city council adopted a resolution concerning its policy of property assessments with respect to the project. The city's policy was to assess landowners for new sidewalks only where none had previously existed, or where the sidewalks were seriously damaged prior to the commencement of construction.

The record indicates that the events surrounding the Twelfth Street-Liberty Avenue project were essentially the same as those surrounding the Ninth Street project, except for the fact that the actions undertaken thereto occurred on different dates.

The Department of Housing and Urban Development ("HUD") eventually approved the city's applications for the street improvement projects, and granted the city $800,000 for the projects. However, by letters dated November 24, 1976 and December 29, 1976, HUD notified the city that Block Grant funds had to be used for construction costs and could not be escrowed and applied directly to assessment relief for disadvantaged property owners.

Following the completion of both projects, the city council approved and levied property assessments on af-

fected landowners for the costs of the projects in March and June 1981.

Several of the appellants testified that they received no notice of possible assessments until their bills arrived in 1981. Some of the appellants testified that they were unaware of the fact that they could be assessed for owning land adjacent to property where the street improvements took place. Several appellants complained that the assessments levied on their properties exceeded one-third of the county auditor's valuation of their properties after the improvements.

In March 1982, appellants brought this action in the court of common pleas seeking to enjoin the assessment and collection of the street assessments levied on their properties.

On January 20, 1983, the trial court denied appellants' claim for equitable relief. The trial court held that appellees "substantially complied" with the provisions contained in R.C. Chapter 727 with respect to notice concerning the city's resolution to undertake the street improvements and levy assessments. The court also found that none of the assessments levied by the city exceeded the one-third limitation on value under R.C. 727.03, or that appellees had acted improperly in their calculation of the assessments in light of the federal funds received for the projects. Lastly, the trial court held that the appellants were estopped from complaining about the assessments, based upon their failure to timely object to said assessments. Because of this, appellants were estopped from presenting evidence with respect to damages to their properties which they claimed were caused by the street improvement projects.

Upon appeal, the court of appeals reversed and remanded in part in a split decision. The appellate court majority found that the appellees had substantially complied with notice requirements, and therefore affirmed that portion of the trial court's disposition. However, the court of appeals reversed the lower court with respect to the calculation of the assessments in light of the federal funds received by the city. The court further held that the trial court erred in denying appellants the opportunity to present evidence concerning the claims of damages to their properties as a result of the street projects.

The cause is now before this court pursuant to the allowance of a motion and cross-motion to certify the record.

Spater, Gittes & Terzian, Frederick M. Gittes, Kathaleen B. Schulte, Columbus, and Robin A. Bozian, for appellants and cross-appellees.

Peck, Shaffer & Williams, Thomas A. Luebbers, Cincinnati, and Charles Cooper, City Solicitor, Ironton, for appellees and cross-appellants.

PER CURIAM.

The first issue presented for our consideration is whether the appellees substantially complied with the notice provisions set forth in R.C. Chapter 727 in a manner satisfying due process, as a matter of equity. The appellees contend that they substantially complied with these requirements in notifying affected property owners of potential assessments arising out of the street projects. The appellant property owners counter that the record is replete with examples of either sloppily attempted notification or simply no notification at all, and that such

amounts to a denial of due process. Within this notice issue, appellants contend that the appellees failed to file the profiles and plans of the projects with the clerk of city council in a timely manner as mandated by R.C. 727.12. The appellants further contend that the resolutions adopted by city council were undertaken before most property owners received the purported notice, and before the plans were finalized. Appellants submit that some properties were assessed an amount exceeding one-third of the county auditor's valuation for said properties, thus violating the strictures of R.C. 727.03. The appellees counter this assertion by contending that the valuations for the purposes of assessments are computed with respect to the actual value of properties, and not the valuations computed by the county auditor for taxing purposes.

With respect to this notice issue, as well as the other issues involved in the cause *sub judice,* principles of equity must be taken into account along with constitutional considerations of due process. The use of equitable principles is proper not only because appellants have sought injunctive relief, but also by virtue of this court's longstanding application of equity to real estate assessment controversies. See *Kellogg v. Ely* (1864), 15 Ohio St. 64, and *Steese v. Oviatt* (1873), 24 Ohio St. 248.

[1] Our review of the record herein leads us to conclude that while the appellees' methods were less than perfect in apprising affected property owners of the proposed projects and assessments, the appellees did substantially comply with the notice provisions contained in R.C. Chapter 727. As this court held in paragraph five of the syllabus of *Tone v. Columbus* (1883), 39 Ohio St. 281, persons who object to the levy of special assessments on the grounds that the assessment procedures used were defective, may be estopped from raising such objection as follows:

[2] "Active participation in causing the improvement to be made will estop the party engaged therein from denying the validity of the assessment; but to create an estoppel from silence merely, it must be shown that the owner had knowledge: 1. That the improvement was being made; 2. That it was intended to assess the cost thereof, or some part of it, upon his property; 3. That the infirmity or defect in the proceedings existed which he is to be estopped from asserting; and, 4. It must appear that some special benefit accrued to his property from such improvement which it is inequitable, under the circumstances, he should enjoy without compensation."

The record reveals that some of the instant appellants participated in meetings and hearings held with respect to the Block Grant applications and the street improvement projects. Moreover, other property owners who had knowledge of the projects under the *Tone* standard are estopped from claiming that the assessments herein were void *ab initio.*

We find that appellees made a *bona fide*, albeit imperfect, attempt to notify property owners in the affected areas of Ironton by certified mail and by publication. In addition, we believe that the lower courts were correct in determining that the improvements made were within the common knowledge of the persons residing within the areas of the street projects. Our implementation of equitable principles to the matter at hand prevents the hypertechnical application of the notice provisions within R.C. Chapter 727, and compels us to affirm the finding of substantial compliance with respect to those provisions. Our holding of substantial compliance with respect to proper notice necessarily entails a rejection of appellants' due process argument. We therefore affirm the appellate court majority on this issue.

[3] With regard to the issue concerning the lack of profiles and plans for the projects filed with the clerk of city council as required under R.C. 727.12, we are again faced with a technical error on the part of the appellees. Nevertheless, we find that the appellees have substantially complied with the statute in issue. Appellees concede that the plans and profiles were not on file in the office of the clerk of council, since such an office did not exist at the relevant time in issue. However, appellees point out that such plans and profiles were in fact filed with the office of the city engineer. In any event, our review of the record reveals that not one person requested to see the plans or profiles of the projects. Therefore, we affirm the lower court's finding that a failure of exact compliance with R.C. 727.13 was non-prejudicial to appellants.

[4] We also reject appellants' argument that the assessments levied by appellees on certain properties exceeded the one-third limitation contained in R.C. 727.03. The appellants' argument is based on the valuation of property computed by the county auditor for real estate tax purposes. We find that the appellees did not run afoul of this statute because there is ample evidence in the record to show that the assessments were based on the actual value of the subject properties. The record before us indicates that the testimony on tax valuation was not the sole valuation testimony. As pointed out by the court of appeals, several property owners within the projects' area testified that the fair market value of their properties exceeded the amount of the assessments by three times. In affirming the lower courts on this and the other aspects surrounding the notice issue whereby appellants seek to avoid payment on the assessments entirely, we endorse the appellate court's conclusion that "[a]ppellants must not be permitted to avoid the costs of benefits they willingly received."

[5] Turning our focus to the next issue presented, the appellees on cross-appeal contend that the weight of evidence supports the trial court's finding that the city properly used and accounted for the federal funds involved in the projects. We disagree, and uphold the court of appeals' reversal and remand with the express direction that the trial court deduct the sum of $403,982.60 from the total assessment costs and modify each landowner's assessment in proportion to the relative costs of the project in his or her area.

In *Boellner v. Maumee* (1974), 39 Ohio St.2d 47, 313 N.E.2d 827 [68 O.O.2d 27], we stated at 50 and 51, 313 N.E.D2d 827:

"* * * The obvious objective of special assessment statutes, such as those in R.C. Chapter 727, is to allow a municipality to reimburse its treasury for expenditures actually made. *Stockdale Borough v. Astle* (1963), 410 Pa. 257, 189 A.2d 152. If a city were allowed to assess property owners for the total cost of an improvement, without reduction for funds received from other sources such as county, state or federal agencies, the city would reap a financial windfall at the expense of the assessed property owners. Such a result would also be contrary to the rule that a special assessment is valid only if the funds collected thereunder are used for the project for which the assessment was levied. See *Butler v. Toledo* (1855) 5 Ohio St. 225. Therefore, this court holds that the R.C. 727.05 phrase, 'total cost of improvements for which special assessments are levied,' means only those costs for which the city is responsible."

We find that *Boellner* is directly applicable to the case at bar, and further, we adopt the analysis rendered by Judge

Stephenson in his concurring opinion below, with respect to this issue:

"* * * The city received approximately $1,253,000.00 in federal grants. The city used some odd $324,000.00 for start-up and miscellaneous costs, which were not the subject of of any dispute in this litigation. The city used the remaining $929,000.00 to pay off four contracts. The city accounted for roughly $525,000.00 of these funds ($410,000.00 on Ninth Street Project and $115,000.00 on Twelfth Street work) as the city's costs and offset that amount (i.e., $525,000.00) from the total cost of the project. The remaining difference between the $929,000.00 in federal funds used to pay on the contracts and the $525,000.00 which was offset from the total cost amounted roughly to $404,000.00. This amount was never deducted from the total cost of the project and, thus, appellants were assessed an additional $404,000.00. It appears from the record that the city intended to hold this sum, still assess the landowners for it and then use the $404,000.00 they had reserved for assessment relief."

Since appellees' actions here amount to a violation of R.C. 727.05 and are contrary to our prior pronouncement in *Boellner,* we affirm the court of appeals on the federal funds issue, and remand the matter to the trial court in accordance with the instructions heretofore indicated.

[6] The final issue submitted for our consideration is whether the trial court erred in denying the appellant landowners the right to present evidence of alleged damages to their properties caused by the street projects. The appellees, on cross-appeal contend that R.C. 727.18 estops appellants from coming forward with evidence of damages, since appellants did not file claims of such damages within two weeks from the date of completion of the notice required under R.C. 727.13.

In reviewing appellees' contention on this issue, it seems ironic to this court that appellees would argue for an equitable and less restrictive interpretation of the notice provisions and then turn around and contend that R.C. 727.18 should be strictly construed, thus denying appellants the opportunity to present evidence concerning alleged damages to their properties.

R.C. 727.18 provides in relevant part:

"An owner * * * claiming that he will sustain damages by reason of a proposed public improvement * * * shall, within two weeks from the date of completion of the notice required under section 727.13 of the Revised Code, file a claim in writing with the clerk of the legislative authority of the municipal corporation, setting forth the amount of the damages claimed and a general description of the property with respect to which it is claimed such damages will accrue. An owner who fails to file such a claim, shall be deemed to have waived damages and shall be barred from filing a claim or receiving damages. *This section applies to all damages which will obviously result from the improvement, but shall not deprive the owner of his right to recover damages arising, without his fault, from the acts of the municipal corporation or its agents.* * * * " (Emphasis added.)

Based on this statute, we concur with the reasoning of the court of appeals below in finding that a distinction must be drawn between damages that will obviously result from an improvement (*e.g.*, removal of shrubbery) and damages resulting from work negligently performed. A strict application of R.C. 727.18 would effectively foreclose any opportunity to redress alleged damages which, on their face, were incurred outside the scope of the statute. Since the allegation of damages is for those

damages purported to have occurred during the performance of the construction, we affirm the court of appeals' reversal and remand to allow appellants the opportunity to present evidence of alleged damages within this circumstance. A contrary holding on this point might very well ignore the situation where a proprety owner is eventually assessed an amount greater than the benefits conferred by the improvements, because his claimed damages were sustained outside the breadth of R.C. 727.18.

In summary, we affirm the court of appeals majority on each and every aspect decided in this complex controversy. On remand, the trial court is instructed to carry out the explicit directions with respect to the calculation of the assessments in light of the federal funds received by appellees; and to also allow appellants the occasion to present evidence concerning damages alleged to have been caused by negligent construction.

Judgment affirmed.

CELEBREEZE, C.J., and SWEENEY, LOCHER, HOLMES, CLIFFORD F. BROWN, DOUGLAS AND WRIGHT, JJ., concur.

APPENDIX B

COURT OF APPEALS
LAWRENCE COUNTY, OHIO

NINTH STREET COMMUNITY PAVING PROJECT COMMITTEE, ET AL

Plaintiff-Appellants

v.

THE CITY OF IRONTON, OHIO, ET AL
Defendant-Appellees

COUNSEL FOR APPELLANTS: Frederick M. Gittes, Kathaleen B. Schulte, 723 Oak St., Columbus, Ohio

Robin A. Bozian, Southeastern Ohio Legal Services, 407 Second St., Marietta, Ohio

COUNSEL FOR APPELLEES: Thomas A. Luebbers, 2200 First National Bank Center, Cincinnati, Ohio

Charles Cooper, City Solicitor, City of Ironton, 407 Center St., P.O. Bx. 834, Ironton, Ohio

---

This is an appeal from a Lawrence County Common Pleas Court judgment denying Plaintiffs' request to enjoin the collection of special assessments levied on their real estate for street, curb, gutter, and sidewalk improvements in the City of Ironton. The opinion below excellently recites the long and complicated history of this controversy. When making his decision, Judge Bacon carefully considered all the evidence and applicable laws. The decision, however, rests not on principles of law, but on principles of equity.

ASSIGNMENT OF ERROR I

> *"THE TRIAL COURT ERRED IN FINDING THAT THE APPELLEES SUBSTANTIALLY COMPLIED WITH THE PROCEDURAL AND SUBSTANTIVE REQUIREMENTS OF CHAPTER 727."*

Appellants raise many arguments within this assignment of error. First, Appellants contend Appellee did not substantially comply with the notice requirements of Ohio Revised Code Section 727.07. Appellants cite three cases for the proposition that the notice requirements are jurisdictional: *Mallo v. Dover* (1929) 36 O. App. 84; *Melvin v. Chillicothe* (1960) 112 O.App. 521; *D'Antuono v. Springfiled* (1960) 114 O.App. 102.

Appellants fail to note that while those cases held the notice requirements are "jurisdictional", those cases did not preclude the use of the equitable principles of waiver and estoppel to excuse non-compliance with notice requirements in certain situations. In *Melvin* the Court wrote:

> "We must now turn to the question of estoppel and waiver. The situation before us is somewhat analogous to the rule in criminal law to the effect that a forgery, being void, can never be ratified. However, by certain conduct a party may be stopped from raising the defense of forgery. In this case the requirement of service of notice is jurisdictional. Without notice the entire proceedings is a nullilty and cannot be ratified. Did the plaintiffs in anyway acquire knowledge or conduct themselves in such a manner as to invoke the doctrine of estoppel or waive their right to raise the question of failure of service?"

In both *Melvin* and *Mallo,* the Court followed *Joyce v. Barron* (1902) 67 O.St. 264 where the Court specifically

allowed the use of equitable considerations to circumvent the otherwise strict notice requirements of the assessment statutes:

> "Where there is an entire failure to give the notice required, *and the resident owner has no notice or knowlege of the making of the improvement until after it is wholly completed,* an assessment upon his abutting property to pay for such improvement will be perpetually enjoined."(Emphasis Added)

We have reviewed the record below and find sufficient evidence to support the Court's finding regarding Appellee's substantial compliance with the notice requirements.

Appellants' second contention in this assignment of error concerns the Ohio Revised Code Section 727.12 requirement that the city put plans and profiles of the contemplated improvements on file with the Clerk of Council. Appellee agrees there were no profiles on file, and the plans were not filed with the Clerk of Council, but with another city office. The record, however, reveals that the profiles of the land would remain basically the same after the improvements. More importantly for our purposes, the record reveals that not one person requested to see plans or profiles of the project. Hence, the lack of exact compliance with Section 727.12 was non-prejudicial. We find no merit to Appellants' contentions regarding the plans and profiles.

Appellants' third contention in this assignment of error addresses Appellees' failure to file a written cost estimate pursuant to Section 727.12. The Court heard testimony concerning an estimate prepared on March 9, 1976. The Court wrote:

> "Although this estimate is not comprehensive,

> there is no reason to believe it does not comply with Sec. 727.12, and that Council did not have this advice prior to the passage of said resolution. One notes that therein the basis front foot was fixed at $50.00, as projected at the January and February meetings of the Ironton Community Development Committee the previous year. This estimate was widely publicized in front page news reports more likely to be read than the fine print in the legal advertisements among the less read interior of the publication, by which it was clear that residents in the proposed improvement could well be assessed as high as $50.00 per front foot and that the work would be paid by levy on "a full basis".

We find appellants suffered no prejudice as a result of Appellees' failure to strictly comply with Section 727.12.

Appellants' fourth contention under this assignment of error concerns the Section 72.03 requirement that the assessment not exceed one-third of the actual value of the lot and improvements. Appellants wish us to equate the term "actual value" with the value assigned to lands for real estate tax purposes. We note that the tax value testimony was not the only valuation testimony in the case at bar. Several landowners testified that the market value of their property exceeded three times the amount of the assessment. We find their testimony sufficient to support the judgment below.

Appellants' last contention under this assignment of error concern the validity of the first contract between Appellees and the contractors who made the improvements. Appellant contend the contract is unenforceble due to the fact Appellees failed to comply with Chapter 727 requirements regarding resolutions and ordinances. Again, we note the Court below based its decision on principles of

equity, not on principles of law. For over a hundred years, the Ohio Supreme Court has based decisions concerning real etate assessments on principles of equity. *See Kellog v. Ely* (1964) 15 O.S. 64 and *Steese v. Oviatt* (1873) 24 O.S. 248; *Tone v. Columbus* (1883) 39 O.S. 281.

Assessment controversies frequently demand the application of equitable principles because if the landowners who benefitted from the improvements don't pay, other less fortunate landowners in the city will suffer. In *Tone,* the Court illustrated the application of equitable principles in real estate assessment cases:

> "It was as much his duty under these circumstances to make known his objection and assert his rights, as if he saw another person making improvements and expending money for his benefit, under the erroneous impression that he was liable and expected to pay for the same. If with knowledge of the facts he failed to speak but allowed the improvement and expenditure to be made, he would not be permitted to enjoy the benefits conferred and refuse to pay for them. He would be estopped to deny his liability to pay the fair value of what he received."

In summary, we agree with the Court's substantial compliance finding and we agree with the Courts' application of equitable principles in the case at bar. Appellants must not be permitted to avoid the costs of benefits they willingly received.

We note, in addition, that a court need not find substantial compliance before applying equitable principles. In *Steese,* supra, the Court specifically found the City of Akron failed to substantially comply with the statutes. Despite such a finding, the Court went on to apply equitable principles and allow collection of the assessment. Appellants first assignment of error is overruled.

ASSIGNMENT OF ERROR II

> "THE TRIAL COURT ERRED IN FAILING TO ESTOP THE CITY OF IRONTON FROM COLLECTING ALL ASSESSMENTS LEVIED FOR SIDEWALK IMPROVEMENTS WHERE THE CITY HAD BY RESOLUTION ORDERED SUCH SIDEWALKS TO BE CONSTRUCTED FREE OF CHARGE TO THE ABUTTING HOMEOWNERS, AND WHERE THE CITY ENGINEER PROMISED ORALLY THAT RESIDENTS WOULD NOT BE CHARGED FOR REPLACEMENT SIDEWALKS."

Appellants' argument in this assignement of error addresses the weight of the evidence. We have reviewed the record and find sufficient evidence to support the judgment below. City Resolution 76-63 gave the City Engineer discretion to determine which sidewalks needed to be replaced. Testimony below reveals no abuse of that discretion and reveals no compelling equitable or legal reason to enforce the City Engineer's alleged oral promises that Appellants would not be charged for replacement sidewalks.

Appellants' second assignment of error is overruled.

ASSIGNMENT OF ERROR III

> "THE TRIAL COURT ERRED IN FAILING TO ESTOP THE CITY OF IRONTON FROM COLLECTING THE ASSESSMENTS WHERE THE EVIDENCE ESTABLISHED THAT THE CITY FAILED TO SUBSTRACT FROM THE COSTS ASSESSED AN AMOUNT EQUAL TO THE FEDERAL FUNDS RECEIVED BY THE CITY AND USED IN THE IMPROVEMENTS."

Again, Appellants contend the judgment is against the weight of the evidence. In reviewing the record below,

there is sufficient evidence that federal funds were properly used for the benefit of the landowners. We as a reviewing court may not reweigh the evidence. I would overrule assignment of error three.

ASSIGNMENT OF ERROR IV

> "THE TRIAL COURT ERRED IN RELYING ON THE DEFENSE OF ESTOPPEL IN ITS JUDGMENT AND OPINION, WHERE THE APPELLEES INTENTIONALLY AND EXPLICITLY WAIVED SUCH DEFENSE AT TRIAL."

We find no merit to this assignment of error. We agree with Appellee that the Court may *sua sponte* employ equitable principles despite the fact a party "waived" an equitable defense. Equity is a tool to be employed by the Court whenever the law at hand fails to do justice:

> "All great systems of jurisprudence have a mitigating principle, or set of principles, which can be applied to particular cases in which the prescribed forms of the ordinary law seem to fail in attaining their goal of substantial justice. This aspect of the law is called "Equity". In a sense, it is as true of equity in Ohio as in any other system, that its function is to supplement the remainder of the law at points of insufficiency." 41 O. Jur. 3d Equity 1.

Litigants may not unilaterally remove the tools of the court.

Appellants fourth assignment of error is overruled.

ASSIGNMENT OF ERROR V

"THE TRIAL COURT ERRED IN DENYING APPELLANTS THE RIGHT TO PRESENT EVIDENCE OF INDIVIDUAL DAMAGES TO THEIR PROPERTY RESULTING FROM THE STREET IMPROVEMENTS."

Appellants contend they may still file damges claims against Appellees pursuant to Ohio Revised Code Section 727.18. That Section limits the filing of damage claims to the *two week* period following the Section 727.13 notice to landowners of proposed public improvements. Appellants argue that since they never received the notice, the two week filing period never began to run.

We have already decided that Appellees substantially complied with the notice of requirements. Appellants had knowledge of the proposed public improvements for many years, yet failed to speak. Even after the improvements were completed, Appellants failed to speak. This writer would find no error.

In light of the concurring and dissenting opinions filed herein, the court finds that assignments of error one, two and four are not well taken and are overruled. Assignments of error three and five are found to be well taken and are sustained. We, therefore, reverse and remand for further proceedings consistent with the opinion with respect to the disposition of the third and fifth assignments of error. Counsel for the parties are directed to prepare an entry in accordance with this opinion and to submit it to the court.

REVERSED AND REMANDED

Grey, J., Concurs In Part & Dissents In Part With Opinion. Stephenson, J., Concurs In Part & Dissents In Part With Opinion.

NINTH STREET PAVING v. CITY OF IRONTON LAWRENCE COUNTY, No. 1672 & 1674

Stephenson, J. - Concurring In Part and Dissenting In Part:

I concur in part and dissent in part in the disposition of the first assignment of error, concur in the disposition of the second assignment of error, dissent in the disposition of the third, concur in the disposition of the fourth assignment of error and dissent from the disposition of the fifth assignment of error.

With respect to assignment one, I would hold that notice was effective as to all appellants with the exception of those appellants for whom there is no record of service, where service was unclaimed and where notice was not mailed as illustrated by Plaintiff's Exhibit #82. Brent McGinnis, the person in charge of notifying the landowners testified that no follow-up was made with respect to notifying these persons. Although R.C. 727.13 provides that if owners cannot be found, service by publication in a newspaper of general circulation within the municipal corporation will suffice, the evidence in the record reflects that the published notice was dated, in many instances, prior to the dates in which service was attempted by certified mail. Moreover, the publication notice did not contain the names of the persons or descriptions of the property they owned to sufficiently apprise the parties who were not notified by certified mail. Many of the landowners for whom there was no record of service, to whom service was not mailed or for whom service was returned unclaimed, testified that they received no certified mail and either did not see the published notice or, if they read it, did not know it pertained to them. Accordingly, I would hold that the measures undertaken by the City to

notify these persons was not reasonably calculated, under all the circumstances, to apprise them of the action about to be taken and, thus, does not pass constitutional muster.

Appellants argue that those persons who did receive timely notice should be treated as not receiving the same because other provisions mandated in R.C. Chapter 727 were not met. For the following reasons, appellants' argument is not persuasive. There is no evidence that the appellants who received timely notice made an effort to see the plans and/or profiles. Moreover, no objections to the assessments were filed. The failure to file objections within the two weeks authorized pursuant to R.C. 727.15 has been held to preclude "the owner from escaping payment by asserting non-compliance with statutory requirements on the part of the assessing body" but "does not estop him from resisting collection on constitutional grounds." *Domito v. Maumee* (1942), 140 Ohio St. 229, paragraph 2 of syllabus. See also *Burton v. Middletown* (1982), 4 Ohio App. 3d 114.

Further, with respect to the first assignment of error, I would remand for further proceedings to determine whether the assessments levied exceeded one-third the value of the property so assessed. R.C. 727.03 mandates that property owners not be assessed greater than one-third the value of the property assessed. It should be noted that appellee undertook no procedure to be certain that this provision was followed. Appellant relied on the county auditors records for the value of the properties. Appellee presented testimony from landowners that the valuations on the county records were low. However, none of the landowners who alleged that they were assessed greater than one-third the property value so testified. Appellee argues that the county auditor's records are not worthy of belief; but conspicuous by its absence in the record, is any

such finding to that effect by the court below. R.C. 727.03 states that the relevant date of valuation is the date of the assessing ordinance. In the case at bar, the assessing ordinance was passed in 1981. Hence, I would remand for further proceedings to determine whether the property owners were assessed in excess of one-third the value of their property.

On the third assignment of error, *Boellner v. Maumee* (1974), 39 Ohio St. 2d 47 controls. The city received approximately $1,253,000.00 in federal grants. The city used some odd $324,000.00 for start-up and miscellaneous costs, which were not the subject of any dispute in this litigation. The city used the remaining $929,000.00 to pay off four contracts. The city accounted for roughly $525,000.00 of these funds ($410,000.00 on Ninth Street Project and $115,000.00 on Twelfth Street work) as the city's costs and offset that amount (i.e., $525,000.00) from the total cost of the project. The remaining difference between the $929,000.00 in federal funds used to pay on the contracts and the $525,000.00 which was offset from the total cost amounted to roughly $404,000.00. This amount was never deducted from the total cost of the project and, thus, appellants were assessed an additional $404,000.00. It appears from the record that the city intended to hold this sum, still assess the landowners for it and then use the $404,000.00 they had reserved for assessment relief.

I would, therefore, sustain the third assignment of error and order that $403,982.60 be taken off the total cost which was assessed to appellants. Such amount should be divided between the landowners in the Ninth and Twelfth Street areas in proportion to the relative costs of the particular project.

Finally, I would sustain the fifth assignment of error. The issue of damages was sufficiently pleaded in appel-

lants' complaint and was a subject of discovery. R.C. 727.18 reads, in part, as follows:

> "An owner . . . claiming that he will sustain damages by reason of a proposed public improvement . . . . shall, within two weeks from the date of completion of the notice required under section 727.13 of the Revised Code, file a claim in writing with the clerk of the legislative authority of the municipal corporation, setting forth the amount of the damages claimed and a general description of the property with respect to which it is claimed such damages will accrue. An owner who fails to file such a claim, shall be deemed to have waived damages and shall be barred from filing a claim or receiving damages. *This section applies to all damages which will obviously result from the improvement, but shall not deprive the owner of his right to recover damages arising, without his fault, from the acts of the municipal corporation or its agents. . . .* "
>
> (Emphasis Added)

In light of the foregoing, a distinction between damages which will obviously result from an improvement (such as the removal of a true or bush and the change of grade) and damages for negligently performed work must be drawn. The statute requires filing damage claims prior to the time improvements are made where damages will *obviously* result from the improvement. A landowner cannot reasonably be expected to guess whether the work performed on an improvement will be negligently done.

Moreover, the historic rationale for allowing assessments is that an abutting landowner will receive a special benefit which will enhance the value of his property. Thus, property owners have been required to bear a portion of

the cost of the improvement. It has been held that levying assessments in excess of the special benefits conferred is a taking of property to the extent the assessment levied exceeds the benefits conferred. See *Schiff v Columbus* (1967), 9 Ohio St. 2d 31, syllabus four; *Laskey v Hilty* (1951), 9 Ohio App. 137; *Burton,* supra at 119.

Thus, if a property owner is prevented from putting on evidence as to the damages incurred for work negligently performed, to offset the total cost of the improvement, he will, in effect, be assessed greater than the benefits conferred. Indeed, it has been held that "in order to be entitled to an injunction against any part of an assessment for the cost of a public improvement against a lot, the owner thereof has the burden of proving that the lot was not enhanced in value as a result of the improvement in an amount equal to the amount of the assessment."*Schiff v. Columbus,* supra, syilabus five. See also *Burton,* supra, at 119.

I would, therefore, reverse and remand for further proceedings relating to damages for negligently performed work on the improvements.

Ninth Street Paving vs. Ironton, No. 1672 & 1674, Lawrence Co.

GREY, J. CONCURRING IN PART & DISSENTING IN PART:

I concur in part and dissent in part from the majority opinion on its treatment of assignments of error 3 and 5.

On assignment of error 3 I believe the case of *Boellner vs. Maumee* (1974), 39 Ohio St.2d 47 is controlling. In *Boellner* the court said, at page 50:

> "The obvious objective of special assessment statutes, such as those in R.C. Chapter 727, is to allow a municipality to reimburse its treasury for expenditures actually made. *Stockdale Borough v. Astle* (1963), 410 Pa. 257, 189 A.2d 152. If a city were allowed to assess property owners for the total cost of an improvement, without reduction for funds received from other sources such as county, state or federal agencies, the city would reap a financial windfall at the expense of the assessed property owners. Such a result would also be contrary to the rule that a special assessment is valid only if the funds collected thereunder are used for the project for which the assessment was levied. See *Butler v. Toledo* (1855), 5 Ohio St. 225. Therefore, this court holds that the R.C. 727.05 phrase, 'total cost of improvements for which special assessments are levied,' means only those costs for which the city is responsible."

The city received about $900,000. in federal money. It used $500,000. to pay for its costs, and the other [$]400,000. for assessment relief. When calculating the total assessment it subtracted not $900,000., but only $500,000. The other $400,000. was assessed against the property owners. The city has, in effect, collected the $400,000. twice – once from the federal government and once from the property owners. The city then, using the assessment relief board redistributes the $400,000 it has collected in assessments, leaving it with the original $400,000 in federal money. That procedure violates R.C. 727.05. I would sustain assignment of error 3 and remand the case to the trial court with the direction that the sum of $403,982.60 be deducted from the total assessment costs and that each assessment be modified accordingly.

On assignment of error 5, I believe the majority opinion takes a position which is inconsistent. The trial court found there was substantial compliance with Chapter 727 notice provisions. The record shows that the notice procedures were sloppy, bordering on incompetence. However, the purpose of any notice requirement is to make an affected person aware of what is happening. I agree with the majority opinion that the parties were aware of the improvements and the assessments, and though there might not have been strict compliance with the statute, principles of equity require that we not be overtechnical.

But what's sauce for the goose is sauce for the gander.

R.C. 727.18 permits a property owner to file a claim for damage within two weeks of receiving notice of the assessment from the city officials. It strikes me as particularly odd that city officials are given the benefit of the doubt when we consider their duty to give notice, but the taxpayer is held to the strictest compliance with the law on their duty to give notice. Why the double standard?

I would note that the complaint in this case did not include a prayer for damages, and even though counsel attempted to introduce evidence of damage at trial, (see the discussion the record, pg. 164-168) there was no attempt to amend the complaint. Indeed, even though the trial court never actually ruled on the damage complaints but treated them as irrelevant to the issue at hand, this was assigned as a claim of error.

The majority opinion forecloses the property owner's right to prove damages. For the same reasons I concur with the majority on assignment of error 1 — fairness, equity and reasonableness, I would sustain assignment of error 5 and remand the case to the trial court to permit affected property owners to present claims of damgage.

APPENDIX C

IN THE COMMON PLEAS COURT OF LAWRENCE COUNTY, OHIO

NINTH STREET COMMUNITY PAVING

PROJECT COMMITTEE, et al.,

Plaintiffs, Case No. 082-259

vs COURT'S OPINION

THE CITY OF IRONTON, et al.,

Defendants.

Apparently the executive and legislative officers of the City of Ironton long considered the improvements now accomplished in the areas known in this lawsuit as the Ninth Street Development and the Twelfth Street-Liberty Avenue project. The City Engineering department had prepared preliminary plans for these areas which are also in the Campbell-Kingsbury Neighborhood, as early as June 1962. The City hesitated to enact the program by reason of official opinion that the special assessments required to finance the work posed a burden extra-ordinary in the sense that generally the lot owners and residents did not enjoy the per capita income considered average for the City. Foreclosure, the sole remedy for collection of delinquent assessments, is distasteful, even to harried officials required by law to keep their counties and municipalities solvent or to maintain viable credit to finance needed community improvements.

The solution appeared to arrive with the advent of the era of federal Health & Urban Development (HUD)

"block grants." The then City Manager, Richard Roberts, was diligent in that Ironton was one of the early applicants for such aid. An organization known as the Ironton Community Development Committee became extremely active. Many of the plaintiffs herein were seated thereon or enthusiastic in participation therein. When the Committee met in January 1975 the Ninth Street paving project was given priority. The proceedings were reported in detail in a front page article by the managing editor of the Ironton Tribune, a daily publication charged with printing Legal advertising of the several courts and public entities in Lawrence County. Those in attendance agreed that to finance construction special assessments would be levied against the benefitted properties, but owners in the "low income" level be provided some relief. There was input from the Community Action organization and statistics and guidelines from the federal Office of Economic Opportunity.

Of considerable significance in the resolution of the issues in this case, it was asserted and the information widely circulated that paving and curbing costs would be $50 per lineal foot for a 30-foot wide street. There was a proposal that owners within a "poverty guideline" would not have to pay. The news account of the January meeting is in evidence as Plaintiffs' Exhibit 96 and discloses there was discussion on the procedure to retire the special assessments. A bond retirement program was suggested.

The Community Development Committee next met February 5, 1975 at the Kingsbury School which was well attended by residents of the Campbell-Kingsbury neighborhood. Again, the Ninth Street project had priority. The desire for relief from the proposed assessments to those of low income was reasserted. In fact, it was urged

that such relief be "guaranteed." However, CDC Chairman Edwards refuted the possibility of a "guarantee." His caution in that particular proved well advised. The City's good faith proposal to in some manner "escrow" the federal block grant moneys for that purpose ran afoul of federal block grant directives. The City was first apprised of this in a letter November 24, 1976 to the City Manager (at that time N. Lawrence Wolke), urging the city to move more rapidly on the projects authorized by grant of $400,000 in 1975 and like grant in 1976, which also advised the assessment relief proposal was "such an activity (as) would be ineligible." This was further clarified by later HUD letter of March 23, 1977 when the City was advised that the 1975-1976 grants were approved for the Campbell-Kingsbury Neighborhood, and "if the cost of (those) activities would run beyond the $800,000 allocated . . . the City would then determine how the extra cost would be covered." And, "our (HUD) only concern is that the Block Grant funds be used to pay for the construction work. The other financing arrangements are strictly the responsibility of the City of Ironton."

HUD disapproval was only one impasse. In the case of Hall et al., v. City of Ironton, (Appeal No. 1411) by opinion of October 15, 1979 the Lawrence County Court of Appeals declared void the provisions in Ordinance 77-23 which provided for exemption from paying part or all of the assessment to certain abutting property owners, based on their annual income. Obviously, the court of appeals foresees the chaos resulting if welfare or relief principles were incorporated in legislation designed to collect and pay for needed community improvements, which to be sure also benefit and enhance the value of abutting property on street and sidewalk installations.

It appears that at each of the January and February meetings of the Community Development Committee, the assemblage was advised of the essentials related in the narrative in support of the Community Development plan as embodied in the 1975 application to HUD. That the Campbell-Kingsbury neighborhood was a deteriorated area with the greatest concentration of minority group members, that one of the most serious deficiences was lack of properly paved streets, curb, gutters and SIDEWALKS. That the City was giving high priority to the problem, that the City could only provide such facilities by levying special assessments against the properties benefitted for the expense of construction exceeding the federal Block Grant funds. That the City INTENDED to provide a means of assessment relief to those of community who might find the assessments oppressive, BUT that such relief could not be guaranteed. And, again at both meetings it was widely publicized that the assessment would be at the rate of $50 per lineal foot of the streets improved by concrete paving gutters, curbs and sidewalks. There was no equivocation. It was definitely asserted, as the narrative goes on to state, "streets will be installed on a full assessment basis.

The record discloses that the City by passage and enactment of various RESOLUTIONS and ORDINANCES followed exactly the plans and proposals adopted and universally understood prior to, during and after completion of the Campbell-Kingsbury neighborhood street, gutter, curb and sidewalks improvements. Certainly there were many who entertained HOPE that by reason of limited income a method would be invoked to partially or wholly relieve them of payment. Despite the warning by the chief of the Community Development Committee, Chairman Don Edwards, corroborated by City Manager Richard Roberts,

at the January 1975 meeting, no precaution was taken to obtain a legal option, private or public as to the legality of the proposal. It became clear in late 1976 that HUD Block Grant funds could not be so employed. And in October 1979 the City, was advised by the decision of the court of appeals, that there was no provision in the law authorizing special assessments, ORC Sections 727.01 et seq., for selective relief to individual property owners; a logical conclusion, as special assessments are levied against real estate not against individuals. Foreclosure is the sole remedy for collection of delinquent payments with no possibility of a deficiency judgment against the individual.

It is generally known to the lawmakers in the Ohio General Assembly, and we take judicial notice that save in the metro-megalopolis, members of the executive or legislative divisions of public entities for the government of counties, municipalities, townships and schools are likely to lack legal training. True, it is contemplated these individuals have the guidance of legal counsel, but from time to time it may be perfunctory. This is not to say that such was the case here. The City, however, as to assessment relief, was embarking into unfathomed waters and an uncharted legal precipice can, and here did, damage the keel of the ship boarded by citizen and official alike in in anticipation of safe voyage. But not to the extent the enterprise capsized.

Statute law directs municipalities in the levy of special assessments, ORC Sections 727.01 et seq. Yet the procedure is fraught with opportunities for mechanical error. So much so, the General Assembly added Sec. 727.40 to the end Courts liberally construe these matters; and Sec. 727.39 to authorize the City Council, if in its opinion there has been some informality, or, when advised by a court with jurisdiction there has been irregularity, to order a

reassessment WHETHER THE IMPROVEMENT HAS BEEN MADE OR NOT. Nor is there a statute of limitations within which it must exercise its discretion so to do.

Statistics as to the number of municipalities in Ohio and the numerous recourses they have made to special levies were not available. The Ohio law reports do prove that litigation to test the acumen of municipal officers is prodigious. But each case differs and a precedent for later guidance is not easily come by.

The plaintiffs attack virtually every step the City has taken to levy charges upon the property butting the street improvements. The court finds that the defendant City of Ironton, and its duly elected, appointed and acting officials and agents, have SUBSTANTIALLY COMPLIED with the requirements of the Ohio Revised Code, and that the special assessments embodied in the complaint are valid and the City is authorized to proceed with the levy and collection thereof.

It would unduly lengthen this opinion to formally treat each and every of the errors plaintiffs urge. It appears there were certain actions taken or lacking which the City Council anticipated MIGHT imperil the projects. Amendments or remedies were taken to avoid such a possibility. While Section 727.39 offers reassessment if adversities are encountered, there appears no prohibition barring reenactments or amendments Council may make in the trek through the maze the statutes provide.

The court addresses itself in further comment upon the issues to alleged noncompliance with Sec. 727.12 ORC, which alone, the plaintiffs maintain, mandates total invalidity, and, further, denies the City to resort to a reassessment under Sec. 727.39.

The proof is clear that the preliminary plans for the 9th

Street Development and the Twelfth Street-Liberty Avenue project, lack profiles. The query arises: Does this omission void the entire protocol, which with no known dissent, many of the plaintiffs approved and authorized, and in good faith the city did its best to honor? The court finds the omission non-fatal: That the City substantially complied with the requirements of Sec. 727.12.

The City's Engineer, James Meyers considered the addition of profiles to the preliminary plans as not justified in that no change of grade was contemplated as the streets then existed and he was thoroughly familiar with the terrain. Proposed grade is usually taken at the center-line of the street improvements. Technically, an engineer might use the word "profile" interchangeably with a "section" or "cross-section." To the layman, however, it simply means a side view. And, to be sure, the average layman lacks the ability without the assistance of an expert, to determine the effect upon his property of any sections or cross-sections prepared and available for his inspection at the municipal offices.

The evidence is clear that the City constrained the engineers selected to create the construction plans (which were admitted in evidence) to keep improvements within the existing right of way and that grade changes be minimal. In fact, it was the testimony of plaintiffs' expert, James Gabriel, that this is simply standard, good design practice in the absence of such constraint. The witness Gabriel, is a graduate professional engineer, one of three assistant City Engineers for Columbus, the state capital, with unquestioend expertise in street construction. He said the only desirable changes are the minimum necessary for drainage flow. He testified that the maximum change of grade in the Campbell-Kingsbury additions was one of two

feet upon a single occasion,, and there was no evidence the City wound up with vertical slopes at any point in the entire improvement.

Plaintiffs question the veracity of City of Ironton Engineer, James E. Meyers, that Plaintiff's Exhibit 88, purporting to be an estimate of the cost of the 9th Street work, was prepared upon the date it bears, March 9, 1976, and filed prior to the Resolution of Necessity passed by Council March 25, 1976. Although this estimate is not comprehensive, there is no reason to believe it does not comply with Sec. 727.12, and that Council did not have this advice prior to the passage of said resolution. One notes that therein the basis front foot cost was fixed at $50, as projected at the January and February meetings of the Ironton Community Development Committee the previous year. This estimate was widely publicized in front page news reports more likely to be read than the fine print in the legal advertisements among the less read interior of the publication, by which it was clear that residents in the proposed improvement could well be assessed as high as $50 per front foot and that the work would be paid by levy on "a full assessment basis."

Moving on, then, we have a situation wherein Ironton's officials have successfully expended federal money in complete accord with the objectives of Congress in taxing the public for urban development of deteriorated areas. The projects for Campbell-Kingsbury were well conceived. Preliminary plans were prepared at public expense as early as 1962. Only the fiscal aspect divided contemplation from reality. An opportunity arrived with the Congressional funding of HUD in 1975 and 1976. Democratic processes settled the priorities. The plaintiffs can hardly complain that the entire sum of $800,000 was expended to their ad-

vantage. The assessment ordinairly required for the improvement which enhanced the value of their individual freeholds was reduced thereby, possibly by as much as one-third. Nor can they complain that the City failed in good faith to pursue, as contemplated, relief for individuals as may be declared at the poverty level.

However, much of this opinion may be entirely academic. The salient feature of this case is that entirely absent in the evidence is any showing that the plaintiffs have been damaged by any of the alleged deficiencies. They pray not for an adjustment. They simply do not want to pay. Period.

Surely the circumstances proven demand assertion of the principles announced by Judge Donohue in Kasch v. City of Akron, 100 O.S. 229, wherein he made it quite clear the plaintiff's success was directly related to her diligence. There it was much as here. Profiles were not on file prior to the resolution of necessity, the engineers then engaged in drafting the construction drawing. MOREOVER, in Kash such as available were erroneous, specifying a sewer of 40 inches when in fact the project contemplated one of 90 inches! Here there was no infirmity other than lack of profiles, with no damages attributable thereto! No later reported case appears to depart from this declaration, certainly in the nature of equitable estoppel, an enormous aid to resolve controversies of this nature, found at page 240 of Vol. 100, Ohio State Reports.

> "Where the *owner* of property to be assessed for improvements *delays* the bringing of an action to enjoin the collection of the assessment *until after* the improvement is completed and the property benefitted thereby, *naturally* a court will *disregard* irregularities and defects in the proceedings of council in making the assessment, and

> will, *as a rule* sustain an assessment to the extent of the benefit properly chargeable against plaintiff's property had the assessment been legally made."
>
> (Emphasis added)

In fact an extremely broad interpretation has been placed upon Sec. 727.39 ORC. In City of Sidney v. Cummins, 93 O.S. at page 337, the Supreme Court declared:

> "The statutes confer a continuing power upon Council, which is not exhausted until an assessment is made which can be enforced."

Nor, as hereinbefore observed, is Council required to reinitiate from the very beginning, if there be some irregularity or omission. In Raymond v. Cleveland, 42 O.S. 522, an opinion greatly respected in later decisions, with apparent wisdom, it was settled (not dicta) viz:

> "The further objection is made that this was an attempt to assess and not to re-assess . . . . An assessment is well defined in Hill v. Higdon, 5 O.S. 243. A re-assessment is made for the purpose of remedying some error or omission in an assessment, and is a reapportionment of the cost and expense of such improvement, and the imposition may be either upon the same lands or part of the same lands, and it may include other lands. There was *no attempt* by the ordinance of June 9, 1879 to institute a proceeding *DE NOVO,* but *it was a re-assessment,* and in our opinion, clearly authorized."
>
> (Emphasis added)

The evidence is that the City expended the $800 in block grants for expenses properly assigned to cost of construction reducing the special assessment, to the advantage of plaintiffs and the other residents in the project areas. Fur-

ther, the levy does not include the paving required in the intersections and other costs the City is prohibited to recover by special assessment.

Although there was no signed writing, the Ironton Community Development Committee and its members were virtually petitioners for the improvement. One notes that the subscribers to petitions such as qualify under Sec. 727.06 ORC not only consent to assessment for the costs of intersections, but waive the one-third limitation against the value of their lands. While this statute is worthy of equitable consideration by reason of citizen involvement such as the HUD officials expressly commended, it has, of course, no *practical* application here.

There was evidence offered by testimony of several individuals joined as plaintiffs, whose identity is not essential to this opinion, they did not receive notice as deposited in the mail by the City. The court finds substantial compliance with the statutes in the testimony and stipulations. And, of course, a salient point when the prayer is for injunctive relief, no one residing in the Campbell-Kingsbury neighbrohood can legitimately claim he was unaware of the construction of an improvement which interfered with the daily access to their home for many, many months throughout the years 1976, 1977, 1978 and 1979.

Likewise, several testified concerning the necessity for sidewalk construction, averring that at their homesites more or less viable walkways already existed, voluntarily undertaken more or less recently. But, whether required from an aesthetic standpoint; to meet the new curblines; to replace worn, deteriorated or dangerous footways — cordination with the new streets, gutters, curbs, continuity with its neighbors and SAFETY was essential. Clearly their installation was part and parcel of the proposal from

the beginning. And, to be sure, having itself undertaken walkways, the City would be primarily liable for any personal injury chargeable to its negligent installation or maintenance.

By decision otherwise than in accord with this opinion, the plaintiffs have not only the City's expenditure of both HUD grants ($800,000) to their advantage, but thrust upon the residents of Ironton elsewhere is the burden to pay for an improvement remote of little or no benefit to them; and, MOREOVER, unjustly, an onus which materially made the individual properties of the plaintiffs more valuable. One of the earliest expressions by the Supreme Court, when presented with like circumstance, is found in Kellogg, Treas. v. Ely, 15 O.S. 64. The court said: "in the view we take of this case, it is not necessary to enumerate the several steps taken by the county commissioners. . . ." (Ditch and drainage statues involved, but a New York *street* levy was cited as the authority). The trial court had perpetually enjoined, appellate review affirming, collection of the assessment. REVERSED. Page 67, Vol. 15 O.S. – Brinkerhoff, C.J.:

> ". . . when the final order establishing the ditch was made . . . (HERE, would it not be the resolution of necessity passed March 25, 1976, Sec. 7 thereof advising cost and manner of assessment, and ordinances shortly following in conformity to the Resolution?) he (plaintiff) might have then proceeded . . . to undo what may have been erroneously done. And these remedies, if they had been resorted to, would have had these important recommendations – that whatever had been done erroneously *or without authority of law,* would have been set aside; officers would have been instructed as to their duties, and parties as to their rights; and proceedings, recommencing

from the erroneous point of departure, would have been carried on in strict conformity to law, with all just interests respected and all rights conserved. But it does not appear that any resort was had to these remedies.

Again, when the different sections of this ditch were let to the lowest bidder, (HERE, there are FIVE separate such contracts in evidence) and when the first spade had been thrust into the earth in the execution of the contracts . . . before the contractors had expended any money, or the laborers any sweat then, if ever, the remedy by injunction was open to the plaintiff below. . . . It does not appear . . . he ever warned the contractors or laborers that he intended for himself to resist the collection of the asessment which must follow to raise the money to pay them; but remaining inactive and silent until his swamp lands were drained by a ditch of nearly a mile in length, he, then, for the first time, asks interposition of a court. . . . We think he comes too late. The case of Wiggin v. Mayor of New York, 9 Paige, 24, was a case (as HERE) in which an injunction was sought to restrain a city from the enforcement of an assessment for the improvement of a street; and the remarks . . . are very pertinent here.

> 'There is another substantial reason why this court should not interfere by injunction to prevent the (City) from collecting the assessment, but should leave the complainant, if he has any, to his remedy at law. The proceedings for the improvement were commenced five years since, (HERE, six) and the complainant has waited until the improvement had actually been completed several months before he attempted to interfere. His property has received

> the full benefit that it could receive from the improvement . . . A court of equity, therefore, at this late day, will *not interfere with its strong arm to cast the burden of the improvement from those who have been benefitted thereby, and upon those who have not.'* "
>
> (Emphasis added)

The court has rendered its opinion the complaint of the plaintiffs, its prayer and the evidence offered in support thereof. As to the estimate of cost required prior to the resolution, the complaint was that it was inadequate. The court finds there was an estimate. There are no legislative guidelines as to how comprehensive the estimate must be. Apparently all that Council needs to know is total cost, and thus feasible if total cost (less statutory exemptions) must be raised by special assessments against the properties benefitted.

The matter of lack of profiles has been litigated without objection, or so it appears.

The court has concluded that the defect is of no consequence, upon the ground that discovery thereof came long after the improvement had been completed, and objection thereto an after-thought! It is clear that had there been profiles, sections or cross-sections, their existence would not have served any of the plaintiffs. No detriment has been demonstrated. Also the comment on such deficiencies by the Supreme Court are much as in Longworth v. Cincinnati, 34 O.S. 101, wherein plaintiff complained he was assessed for construction of a wall NOT INCLUDED IN THE PLANS NOR SET OUT IN THE PROFILES. The court found the objection "technical, rather than substantial."

Several of the plaintiffs offered evidence apparently in support of "other relief" in addition to the universal de-

mand for a perpetual injunction. None of these individual demands were defined, so that one infers as to them it was simply their desire the assessments be wiped out. But, as has been said, the court has found the City has substantially complied with its proceeedings for the assessments.

The court has further researched the law in this area and believes other authorities aid in the conclusions herein reached. Their inclusion would unduly prolong an already over-lengthy opinion.

The court has caused judgment in accord with this opinion to be entered upon its journal.

/s/ John C. Bacon
JUDGE

APPENDIX D

The Supreme Court of Ohio
Columbus

1986 TERM

To wit: March 12, 1986

Ninth Street Community Paving Project Committee et al., Appellants/Cross-Appellees,	:	Case No. 84-1560
v.	:	REHEARING ENTRY
City of Ironton, Ohio, et al., Appellees/Cross-Appellants.	:	(Lawrence County)

It is ordered by the Court that rehearing in this case be, and the same is hereby denied.

/s/ Frank D. Celebrezze
FRANK D. CELEBREZZE
Chief Justice

I, James Wm. Kelly, Clerk of the Supreme Court of Ohio, do hereby certify that the foregoing order was correctly copied from the records of said Court, to wit, from the Journal of this Court.

IN WITNESS WHEREOF, I have hereunto subscribed my name and affixed the seal of said Supreme Court, on this 12th day of March, 1986.

JAMES WM. KELLY, CLERK
/s/ SAM F. ADKINS, DEPUTY

APPENDIX E

The Supreme Court of Ohio
Columbus

1986 TERM

To wit: January 29, 1986

Ninth Street Community Paving Project Committee et al., Appellants/Cross-Appellees,	:	Case No. 84-1560
v.	:	JUDGMENT ENTRY
City of Ironton, Ohio, et al., Appellees/Cross-Appellants.	:	APPEAL AND CROSS-APPEAL FROM THE COURT OF APPEALS

This cause, here on appeal and cross-appeal from the Court of Appeals for Lawrence County, was considered in the manner prescribed by law. On consideration thereof, judgment of the Court of Appeals is affirmed and cause remanded to the trial court for the reasons set forth in the opinion rendered herein.

It is further ordered that the appellees/cross-appellants recover from the appellants/cross-appellees its costs herein expanded; and that a mandate be sent to the Court of Common Pleas to carry this judgment into execution; and that a copy of this entry be certified to the Court of Appeals for Lawrence County for entry.

/s/ Frank D. Celebrezze
FRANK D. CELEBREZZE
Chief Justice

I, James Wm. Kelly, Clerk of the Supreme Court of Ohio, do hereby certify that the foregoing order was correctly copied from the records of said Court, to wit, from the Journal.

IN WITNESS WHEREOF, I have hereunto subscribed my name and affixed the seal of said Supreme Court, on this date _____.

JAMES WM. KELLY, CLERK
/s/ Sam F. ADKINS, DEPUTY

APPENDIX F

IN THE SUPREME COURT OF THE STATE OF OHIO

NINTH STREET COMMUNITY PAVING
PROJECT COMMITTEE, ET AL.,

Appellants,

vs. Case No. 84-1560

CITY OF IRONTON, OHIO, ET AL.,

Appellees.

NOTICE OF APPEAL

Notice is hereby given that the Ninth Street Community Paving Project Committee, the American Legion Post, Rodney Banks, Don Battiste, Lester Bishop, Hattie Blanche, Columbus Boykin, Leroy and Maxine Boykin, William and Kate Boykin, James Brammer, Adele Brooks, Henry Brown, Jr., Michael and Belinda Brown, Sam Brown, Emerson and Pauline Browning, Haskell and Ella Coleman, Lawrence and Lucille Collins, Thelma and Casey Colvin, Jemus Cunningham, Claude Davis, Velma Davis, Howard Dawkins, Norma and Jonas Doughman, Richard Duvendeck, Hershel and Ellizabeth Estep, Ernestine Fields, William and Elsie Fletcher, Rev. Coss Ford, Marjorie and Sam Ford, Gordon and Nancy Fossett, Wilma Fox, Harold and Betty Gordon, Freda Hafle, Samuel T. Hayes, Jack Holland, Glenn and Freda Holmes, Zelma Holmes, Haywood Isaac, James and Marjorie Jackson, William and Janet Jackson, Emmett R. Jenkins, George and Verna Mae Johnson, Betty Rapp Jones, Lawrence J. Keating, Nathan and Gwen Lewis, Herbert A. Lewis, Sr., Isabel Livisay by Laverne Thomas, Leonidas and Frances Livisay, A.D. Lutz, James McConnell, Margaret McCreary, Michael McFann, John Mabry,

Roberta Malone, Lowell and Stella Massie, Floyd and Lillian Miller, A.L. Moore Lodge No. 442, Elsie O'Leary, Virginia Payne, Ed and Mary Pleasant, Harold and Cheryl Pleasant, Robert and Virginia Pleasant, Eugene Quarles, Quinn Chapel A.M.E. Church, Henry Roach, Jr., Henry Roach, Sr., Rosetta Roberts, Hyacinth Rollins, Gloria and Hobert Royal, Ruby Shropshire, Robert and Doris Smith, Clyde Sneed, Charles Stapleton, Eugene and Elizabeth Steward, Naomi Steward, John Sullivan, Rubin Taylor, Amos Thomas, Triedstone Baptist Church, Hannah and Rachel Urich, Darwin Vanderpool, Carrie Ailster Vinson, Raymond Vinson, Frances Washington, Patty and James Watson, Mary and Walter Williams, Harlan and Fern Wise, Appellants herein, appeal to the United States Supreme Court from the Judgment Entry of January 29, 1986, of this Court, affirming the decision of the Lawrence County, Ohio Court of Appeals, overruling Appellants' Assignments of Error. Appellants bring this appeal pursuant to 28 United States Code §1257(2).

Respectfully submitted,

/s/ Frederick M. Gittes
Frederick M. Gittes
SPATER, GITTES & TERZIAN
723 Oak Street
Columbus, Ohio 43205
614/221-1160

/s/ Robin A. Bozian
Robin A. Bozian
SOUTHEASTERN OHIO LEGAL SERVICES
407 Second Street
Marietta, Ohio 45750
614/374-2629

/s/ Kathaleen B. Schulte
Kathaleen B. Schulte
SPATER, GITTES & TERZIAN
723 Oak Street
Columbus, Ohio
614/221-1160

Attorneys for Appellants